Supreme Court, U.S.
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No. 99-

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1999

NAZARETH ANDONIAN, and,
VAHE ANDONIAN,
Petitioners,
vs.
UNITED STATES OF AMERICA,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is the showing required for issuance of a "certificate of appealability" under 28 U.S.C. § 2253(c)(2) more demanding than the showing that was required for issuance of a "certificate of probable cause" to appeal, as suggested by the Ninth Circuit, or is it the same, as nine circuits have ruled?

2. Petitioners, both first offenders who were legitimate gold brokers for many years, were sentenced to 505 years imprisonment for laundering of money; conduct that would not have been punishable at all, had it occurred approximately a year earlier. Had petitioners' attorneys understood the Sentencing Guideline's "grouping" rules, and, had the district court correctly applied the grouping rules, the maximum sentence would have been 20 years.

Were petitioners entitled to a "certificate of appealability" to obtain review of the district court's ruling upholding the legality of its 505 year sentence, as to the issue of whether they were denied effective assistance of counsel at sentencing, by their attorneys' ignorance of the Sentencing Guideline "grouping rules," and the district court, because it failed to apply the grouping rules?

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ORDERS OF THE DISTRICT AND CIRCUIT COURT

The October 27 and November 2, 1998, orders of the Court of Appeals for the Ninth Circuit construing the petitioners' petitions for rehearing and suggestion of rehearing en banc as motions for reconsideration and suggestion for rehearing en banc are unreported. A copy of those orders are Appendix A-1 and B-2. The July 7, 1998, orders of the Court of Appeals for the Ninth Circuit denying petitioners' applications for a certificate of appealability are unreported. Those orders are reproduced at Appendix C-3 and D-4.

The district court's orders denying petitioners' requests for a certificate of appealability are unreported. Those orders are reproduced at Appendix E-5-6 and F-7-8. The district court's order denying the petitioners' motions pursuant to 28 U.S.C. § 2255 is unreported. The order is reproduced at Appendix G-9-14.

JURISDICTION

Petitioners invoked the jurisdiction of the district court by filing motions pursuant to 28 U.S.C. § 2255.

Petitioners filed timely notices of appeal and invoked the jurisdiction of the court of appeals by seeking a certificate of appealability under 28 U.S.C. § 2253(c)(2).

A two judge motions panel of the Ninth Circuit issued orders denying both petitioners a certificate of appealability. App. C-3 & D-4.

The jurisdiction of this Court to review the orders of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1). *See, Hohn v. United States*, 118 S. Ct. 1969, 141 L. Ed.2d 242 (1998).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

Section 2253 of 28 U.S.C. provides:

§2253. Appeal

(a) In a habeas corpus proceeding or a proceeding under section 2255 before a district judge, the final order shall be subject to review, on appeal, by the court of appeals for the circuit in which the proceeding is held.

(b) * * *

(c)(1) Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from --

(A) * * *

(B) The final order in a proceeding under section 2255.

(2) A certificate of appealability may issue under paragraph (1) only if the applicant has made a substantial showing of the denial of a constitutional right.

(3) The certificate of appealability under paragraph (1) shall indicate which specific issue or issues satisfy the showing required by paragraph (2).

STATEMENT OF THE CASE

A. Introduction & Overview

Vahe Andonian and Nazareth Andonian, both first offenders and legitimate gold brokers for many years, were convicted in 1990 of conspiring to launder money and twenty-five substantive counts of money laundering (18 U.S.C. § 1956).

Because of Constitutional errors at sentencing, including their attorneys' unfamiliarity with the Sentencing Guideline grouping rules, the district court sentenced both petitioners to prison for 505 years. For conduct that would

not have been punishable at all had it occurred approximately a year earlier, petitioners were sentenced to prison for more than half a millennium.

The district court wrote the Sentencing Commission after the sentencing, suggesting it provide rules for future cases like this one, unaware that the Commission had done so well before petitioners were sentenced. Had the applicable Guideline rules, already in effect, been applied, the maximum allowable sentence would have been 20 years.

The same attorneys who missed these issues at sentencing, also missed them on direct appeal. They were raised for the first time by new counsel in a collateral challenge, and denied by the district court without a hearing. App. G-9. The district court also denied petitioners the right to appeal its ruling. E-5 & F-7. The district court gave no reason for not allowing its ruling to be appealed, and merely checked the box of a preprinted form order that stated the result. *Id.* A two-judge motions panel of the Ninth Circuit Court of Appeals also denied petitioners the right to appeal in identical one sentence orders that stated the result, but gave no reason for it. App. C-3 & D-4. As a result, the only court to whom the petitioners have been allowed to present the merits of their constitutional claims to the 505 year sentences, is the court that imposed the sentences.

No law allows a judge who is confronted with the substantial and serious claims of constitutional error to sit in final review of his or her own rulings. The two-judge

motions panel was wrong to conclude that Congress passed such a law in 1996 by the amendments to 28 U.S.C. § 2253.

B. Initial Proceedings In The District Court

Petitioners were charged in a superceding indictment with conspiring to distribute cocaine, conspiracy to launder money and substantive counts of money laundering. After a nine-month trial, during which the government introduced absolutely no evidence of any narcotics activity, the jury failed to return a verdict on the drug conspiracy charge. Clerk's Record ("CR") 853. Petitioners were convicted of the conspiracy to launder money, or more specifically, conspiring to engage in "financial transactions" for a prohibited purpose, with money they knew was the proceeds of either narcotics activity or tax evasion.[1]

Given the government's expansive definition of what can be a "financial transaction," the number of individual "financial transactions" that could be carved out of the

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[1] 18 U.S.C. § 1956 ("Laundering of monetary instruments"). Section 1956(a)(1) requires the government to prove the defendant knew the money was the proceeds of "some form of unlawful activity." In this case, prosecutors argued to the jury that the "unlawful activity" that defendants knew the money was the proceeds of was either narcotics activity or tax evasion. RT 19475 (Vol. 96; 11/28/90); RT 19632 (Vol. 97; 11/29/90).

government's evidence was practically limitless."[2] The government chose 25 "transactions" to charge as separate substantive counts, which were also charged as being the objects and overt acts of the conspiracy. The jury convicted petitioners of the 25 counts, which the prosecution had also identified and charged as being objects of the conspiracy.

Petitioners were sentenced on August, 21, 1991. CR 946, 948. To determine the Guideline offense level, the district court correctly "grouped" all of the counts together -- that is, it added together the amount of money involved in each count, and then used the total amount of money to determine the offense level. The Guidelines further provide that when separate counts of conviction are "grouped" together to determine the offense level, the "grouped counts"

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[2] The mere physical movement of U.S. currency from one location to another, according to the government, constituted a "financial transaction," even if no disposition of the money was effected when the money was moved from one location to another. Consistent with that counter-intuitive definition of a financial transaction, the government charged petitioners with fourteen substantive counts based solely on the physical transportation of U.S. currency from New York to Los Angeles (counts 3-16). The eleven remaining financial transaction counts (17-27) were based on the deposit of that cash by petitioners into their business account, Andonian Brother's Inc., at First Los Angeles Bank. All of the deposits were documented by currency transaction reports completed in petitioners' own names.

are to be considered as one offense for purposes of imposing sentence. In imposing sentence, however, the court "ungrouped" the counts and treated each separately. The court imposed the statutory maximum for each count, and ordered the sentence for each count to be served separately -- 25 consecutive 20-year terms for each "financial transaction," plus a five-year consecutive term for conspiring to commit those financial transactions. The overall sentence produced by this method was 505 years imprisonment. Petitioners' attorneys failed to raise any objection to this inconsistent use of the grouping rules, nor did either attorney make any affirmative argument explaining how the grouping rules limited the maximum sentence to 20 years.

C. Direct Appeal

Both petitioners appealed. The lawyers who represented petitioners on appeal were the same lawyers who represented them at trial. Their ignorance of the Guideline grouping rules remained; they did not discuss the effect the grouping rules would have had upon the sentence had they been properly applied, nor did they argue that the failure to apply them properly was grounds for resentencing. The Court of Appeals for the Ninth Circuit affirmed in an unpublished memorandum disposition issued July 19, 1994.

Petitioners filed a joint petition for a writ of certiorari to this Court, which was denied on January 23, 1995.

E. Collateral Proceedings

Petitioners filed identical motions under 28 U.S.C. § 2255 to vacate their convictions and sentence on April 23, 1997. The government filed its response on July 8, 1997. Petitioners then applied for an order permitting them to file a reply to the government's answer. On December 19, 1997, the district court filed a single order denying the motions and formally denying the application to file a reply to the government's response. App. G-9-14.

Petitioners filed timely notices of appeal on February 19, 1998. The district court issued orders denying a certificate of appealability on April 24, 1998. App. E-5 & F-7. On May 15, 1998, petitioners each filed an application with the Court of Appeals requesting a certificate of appealability. In identically worded orders filed July 7, 1998, a two judge motions panel of the Ninth Circuit denied petitioners a certificate of appealability. No reason was given for the denials. App. C-3 & D-4.

Thereafter, Petitioners filed a petition for rehearing with a suggestion of rehearing en banc, pursuant to F.R.A.P. 35 & 40. In orders issued October 27 and November 2, 1998, the same two judge motion panel that initially denied petitioners a certificate of appealability, issued orders stating that the rehearing petitions were construed as motions for reconsideration and suggestion of rehearing en banc, and so construed were denied. App. A-1 & B-2.

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. Review should be granted because the ruling of the Court of Appeals for the Ninth Circuit reflects that Circuit's use of a standard for the issuance of a "certificate of appealability" that is different than the standard applied in nine other Circuits.

Nine circuits have concluded that the showing required for the issuance of a "certificate of appealability" is the same showing this Court said was applicable to the issuance of a "certificate of probable cause" to appeal -- namely, that a certificate should be granted if the "'issues are debatable among jurists of reason; that a court could resolve the issues [in a different manner]; or that the questions are adequate to deserve encouragement to proceed further.'"[3] The Ninth Circuit, in contrast, has repeatedly suggested that a more demanding standard applies to the issuance of a certificate of appealability, but has not given a reason for that position, nor has it attempted to articulate that more demanding standard.

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[3] *Barefoot v. Estelle*, 463 U.S. 880, 893, n.4, 103 S. Ct. 3383, 3394, n.4, 77 L. Ed.2d 1090 (1983), *quoting, Gordon v. Willis*, 516 F.Supp. 911, 913 (N.D. Ga. 1980) (internal quotations omitted) (bracketed material from original).

Review in this case will allow the Court to resolve these conflicting interpretations and applications of 28 U.S.C. § 2253(c)(2), the statute governing issuance of a certificate of appealability. A ruling from this Court is necessary to insure that a defendant's right to appeal does not depend upon the circuit in which he seeks to exercise that right.

2. Review should be granted because the district court's unexplained denial without an evidentiary hearing of petitioners' claim that they were denied effective assistance of counsel at sentencing, plainly warrants the issuance of a certificate of appealability. The truly draconian 505 year sentence imposed by the district court serves to make it more important that there be appellate review, and more obvious why there should be appellate review.

Petitioners, however, have been denied the right to review by a two-judge motions panel that gave no reasoned for its denial. C-3 & D-4. Moreover, as a result of that denial, the only court the petitioners have been allowed to present these serious constitutional errors to, is the court whose illegal sentences are challenged by their constitutional claims.

No statute should or does allow a judge to sit in final judgment of his or her own rulings, where it is plausibly maintained that the rulings involve and constitute serious constitutional violations. In refusing petitioners' request to appeal, the district court and motions panel misinterpreted and misapplied the statutory provision governing the issuance of a certificate of appealability under 28 U.S.C. § 2253(c)(2).

The motions panel ruling, in preventing the petitioners the ability to obtain appellate scrutiny of these claims, and in allowing the final decision to be made by the judge who committed the errors, "so far depart[s] from the accepted and usual course of judicial proceedings" that it alone is reason enough to require review by this Court. Supreme Court Rule 10(a). Unless those errors are corrected, they will cause two first-offenders, who the government was unable to convict of having any involvement in a narcotics conspiracy, to remain in prison for life, when the maximum lawful sentence is 20 years. Moreover, if a system is sanctioned in which the judge who is the source of a non-frivolous claim of constitutional error has the final word as to whether there was error at all, other defendants and petitioners with equally meritorious claims, who face comparable consequences, will suffer similarly in countless cases yet to come.

REASONS FOR GRANTING THE WRIT

I. The Court Should Grant Review To Decide Whether The Showing Required For Issuance of a "Certificate of Appealability" Is The Same As, or More Demanding Than, The Showing This Court Required For Issuance of a "Certificate of Probable Cause to Appeal"

Prior to enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), state prisoners who sought to appeal a federal district court's denial of a habeas petition were required to obtain a "certificate of probable cause to appeal" ("CPC"). This Court stated in *Barefoot v. Estelle*, that it agreed with the standard adopted by the federal courts that a prisoner was entitled to a CPC if "the issues [to be raised on appeal] are debatable among jurists of reason; a court could resolve the issues [in a different manner]; or that the questions are 'adequate to deserve encouragement to proceed further.'"[4]

As part of the AEDPA legislation, "certificates of probable cause to appeal" were replaced by "certificates of appealability."[5] Congress also expanded their application to

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[4] *Barefoot*, 463 U.S. at 893, n.4, 103 S. Ct. at 3394, n.4, *quoting, Gordon v. Willis*, 516 F. Supp. at 913.

[5] *See, Parkus v. Bowersox*, 157 F.3d 1136, 1140 (8th Cir. 1998).

federal prisoners as well as state prisoners. Under 28 U.S.C. § 2253 as amended, a state or federal prisoner who seeks to appeal a federal district court's denial of a collateral challenge must obtain a "certificate of appealability ("COA")." To obtain a COA, the applicant must make "a substantial showing of the denial of a constitutional right."[6] 28 U.S.C. § 2253(c)(2).

This Court has not yet addressed the question of whether the showing required to obtain a COA is the same as, or different than, the showing that was required for issuance of a CPC. Nine circuits have concluded they are the same.[7]

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[6] This showing must be made with respect to a particular issue, and only issues at which a COA has been issued may be raised on appeal. 28 U.S.C. § 2253(c)(3). As the Seventh Circuit noted in *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996), in this sense, a COA is more limited than was a CPC, because a CPC was not limited to specific issues. *See also, Parkus*, 157 F.3d at 1140, *citing, Herrera, supra.*

[7] *See, Byrd v. Henderson*, 119 F.3d 34, 36 n.3 (D.C. Cir. 1997); *Tejeda v. Dubois*, 142 F.3d 18, n.4 (1st Cir. 1998); *Reyes v. Keane*, 90 F.3d 676, 680 (2d Cir. 1996); *Byrd v. French*, 147 F.3d 319, 325, n.4 (4th Cir. 1998); *United States v. Garza*, __ F.3d ___, 1999 U.S. App. LEXIS 415 (5th Cir. 1999); *Lyons v. Ohio Adult Parole Authority*, 105 F.3d 1063, 1073 (6th Cir.), *cert. denied*, 117 S. Ct. 1724 (1997); *Herrera v. United States*, 96 F.3d 1010, 1012 (7th Cir. 1996); *Lennox v. Evans*, 87 F.3d 431,

The Ninth Circuit is alone in suggesting "that 'the standard for obtaining a certificate of appealability under [AEDPA] . . . is more demanding than the standard for obtaining a [CPC] under the law as it existed prior to the enactment of [AEDPA] . . .'"[8]

Admittedly, the Ninth Circuit has only made this suggestion in *dicta*, and has not explicitly adopted it as a holding in any published opinion. Nor has the Ninth Circuit, however, tempered its suggestion that a more demanding standard applies, or restricted Ninth Circuit district and circuit judges in using a more demanding standard. The absence of an explicit holding requiring the use of a more demanding standard does not mean defendants who are denied a COA

433-34 (10 Cir. 1996), *cert. denied,* 117 S. Ct. 746 (1997), *overruled on other grounds, United States v. Kunzman*, 125 F.3d 1363 (10th Cir. 1997).

[8] *Greenawalt v. Stewart*, 105 F.3d 1268, 1272-73 (9th Cir. 1997) *citing, Williams v. Calderon*, 83 F.3d 281, 286 (9th Cir. 1996); *Nevius v. Summer*, 105 F.3d 453, 458 (9th Cir. 1996) ("We have stated in dicta that the new standard is stricter than the old one.") *citing, Williams v. Calderon, supra*; *see also, United States v. Cruz-Mendoza*, 147 F.3d 1069, n.8 (9th Cir. 1998), *as amended*, 1998 U.S. App. LEXIS 33438 (Dec. 31, 1998) ("We need not decide the exact contours of the 'substantial showing' standard of sec. 2253(c)(2) because Cruz cannot meet even a most generous reading of it.")

have not been prejudiced by application of a more demanding standard, it only means that they cannot prove it. Thus, the failure of the Ninth Circuit to correct the suggestions it has made in *dicta*, and hold explicitly that the showing required for a COA is the same as was required for a CPC, is reason enough to warrant review by this Court.

Correction of the use of a more demanding standard is especially important given the expansion of COAs to federal prisoners. In deciding whether to issue a CPC, district court judges were deciding whether an appeal should be allowed from its review of a state court ruling. In contrast, in deciding whether to issue a COA in a § 2255 proceeding, the district court judge is deciding whether to allow an appeal of its own decision, as to an issue which it alone has received a full presentation. In order to protect against the inevitable, even if unintentional, tendency to believe in the correctness of one's own decisions, the standard for issuance of a COA in a § 2255 proceeding should not be more protective of the ruling sought to be appealed than the standard this Court ruled was applicable to a CPC.

Enforcement of that standard is especially important in this particular case. In *Barefoot*, this Court recognized that "[i]n a capital case, the nature of the penalty is a proper consideration in determining whether to issue a certificate of probable cause . . ."[9] While this is not a capital case, the

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[9] *Barefoot*, 463 U.S. at 893, 103 S. Ct. at 3393-94.

consequence of the penalty -- life in prison until death for laundering money -- should make it more deserving of scrutiny than the run-of-the-mill § 2255 collateral challenge. Certainly it would seem to be more deserving of consideration than a one-sentence, unexplained denial from a two-judge panel hearing motions would suggest it received.

Although petitioners application to the Ninth Circuit for a COA, as well as their rehearing petition to the Ninth Circuit motions panel, specifically requested that the court apply the CPC standard, the court failed to state what standard had been applied. App. A-1, B-2, C-3, D-4. The ruling of the motions panel denying the petitioners' a COA can only be interpreted as reflecting application of a more demanding showing than was required for issuance of a CPC. As is demonstrated in section II, *infra*, the issues petitioners sought to raise on appeal with respect to the denial of their sentencing claims, easily surpass each of the formulations of the showing this Court ruled was applicable to the issuance of a CPC -- "the issues [to be raised on appeal] are debatable among jurists of reason; a court could resolve the issues [differently]; or that the questions are 'adequate to deserve encouragement to proceed further.'"[10]

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[10] *Barefoot*, 463 U.S. at 893, n.4, 103 S. Ct. at 3394, n.4, *quoting, Gordon v. Willis*, 516 F. Supp. at 913.

II. Under The Circumstances of This Case, The District Court Should Not Be The Only Court To Decide The Legality Of Its 505 Year Guideline Sentence, Nor Should It Be The Only Court That Fully Considers The Merits Of Petitioners Challenges To The Sentence On Fifth And Sixth Amendment Grounds

A. The Sentencing Proceeding and Guideline Calculation

As first offenders, Vahe and Nazareth Andonian each had a Category I criminal history. The Probation Office and the government agreed that in determining the offense level, the "grouping" rules of the Guidelines applied. At ¶ 109 of both presentence reports ("PSR"), the probation officer acknowledged that "according to Section 3D1.2(d), these counts are to be grouped." Likewise, the government stated that the "350 million was laundered by defendants as part of the 'same course of conduct or common scheme or plan'" and acknowledged that the "substantive counts are properly grouped under § 3D1.2."[11] (emphasis added). The Probation Office and the government, however, only addressed the effect of the grouping rules on the offense level determination, and not on the imposition of the sentence or

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[11] See, pp. 8-10 of "Government's Response to Defendants' Positions With Respect to Sentencing Factors," attached as Exhibit S to petitioners § 2255 motions in the district court.

the determination of the length of the sentence.

Counsel for Nazareth Andonian briefly referred to the grouping rules in a written pleading, but did not explain the grouping rule or their application to the case[12], and counsel for Vahe Andonian did not mention § 3B1.2 at all.[13] At the sentencing hearing, the petitioners' attorneys both submitted on their paperwork and said nothing about the Guidelines. *See*, RT 8/20/91; at 24, 113, 120-135.

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[12] The indirect reference consisted entirely of the following: "The probation officer has incorrectly added up the number of counts and thereby concluded that the defendant can be sentenced to either life or 505 years. This is incorrect. Because of the Doctrine of Merger, this Court, we believe, can sentence a defendant to no more than a total of 25 years, this consists of 5 years for the conspiracy count (Count 2) and 20 years apiece for each of the substantive counts. This doctrine is incorporated in § 3B1.2 of the Federal Sentencing Guidelines Manual." See p. 3 of "Position of Defendant Nazareth Andonian With Respect to Sentencing Factors," attached as Q to petitioners § 2255 motions in the district court.

[13] Vahe Andonian's counsel told the court in writing that, "the defendant fully expects the worse at his sentencing hearing. Counsel likewise anticipates that the end result is pre-ordained, and accordingly, does not intend extensive argument." See p. 6 of "Position of Defendant Vahe Andonian With Respect to Sentencing Factors," attached as R to petitioners § 2255 motions in the district court.

The Court adopted the PSR and government's recommendation that the base offense level was 23 and the special offense characteristics added another 16 points.[14] As to role in the offense, the Court also adopted the PSR and government recommendations that Vahe Andonian be assessed 3 points and that Nazareth Andonian be assessed 4 points. The Court found Vahe Andonian committed perjury when he testified, and assessed a two-level increase points for obstruction of justice (8/20/91 RT 147-152). The Court found that Vahe's adjusted offense level was 45 and that Nazareth's was 44 (8/21/91 RT 191-192).

Although level 43 calls for a life sentence, the Court still departed upward one additional level, based on the total amount of money laundered. The Court also remarked that the money laundering operation was "very sophisticated."

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[14] Based on application of the grouping rule the PSR for Vahe Andonian calculated the guideline sentence as follows: 360 months to life: Base Offense Level at 23 (money laundering [§ 2S1.1]); Specific Offense Characteristic 16 [over $100 million]; Role in the Offense 3; Adjusted Offense Level 42, equating to a Guideline range of 360 years to life. The PSR for Nazareth Andonian calculated the guideline sentence at Life (505 years) after assessing him a 4-level adjustment for Role in the Offense (¶ 113), thus bringing his Adjusted Offense Level to 43. The PSR for both also stated that the amount of money laundered, more than $300,000,000, might warrant an upward departure as the "Guidelines does [sic] not take into account amounts higher than $100,000,000." ¶ 153.

(8/21/91 RT 191-192).[15]

B. Under The Grouping Rules, The Money Laundering Counts Are Treated as a Single Offense

1. Policy Statements and Commentary

"Where a policy statement prohibits a district Court from taking a specified action, the statement is an authoritative guide to the meaning of the applicable Guidelines."[16] Where a district court fails to follow the policy statements, it has "imposed [the sentence] as a result of an incorrect application of the Sentencing Guidelines."[17]

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[15] The Ninth Circuit held that the reason the district court did give for departing -- the amount of money laundered -- was not a valid basis for doing so, but that a consideration not identified by the Court as a reason to depart -- the sophistication of the crime -- was a valid basis to depart. *United States v. Andonian*, U.S.C.A. Nos. 91-50622-26, Mem. Disp. [1994 U.S. App. LEXIS 18124, p.16.

[16] *Williams v. United States*, 503 U.S. 193, 200, 112 S.Ct. 1112, 117 L.Ed.2d 341 (1992).

[17] *Id.*, 503 U.S. at 201.

The commentary accompanying the Guidelines is also binding, unless the commentary is inconsistent with the Guideline text.[18]

No one disputed in this case that all of the money laundering counts, and the conspiracy,[19] had to be "grouped" in accordance with § 3D1.2 (Groups of Closely Related Counts). Not only is money laundering listed as an offense for which grouping is mandatory under subsection (d), but as the government argued, the counts were also subject to grouping under subsection (b) because they involved "two or more acts or transactions connected by a common scheme or plan."[20]

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[18] *Stinson v. United States*, 508 U.S. 36, 42, 44 113 S.Ct. 1913, 123 L.Ed.2d 598 (1993).

[19] Similarly, the conspiracy count was subject to grouping as explained in Application Note 6 of § 3D1.2.

[20] "(d) **When the offense level is determined largely on the basis of the total amount of harm or loss**, the quantity of a substance involved, or some other measure of aggregate harm, **or if the offense behavior is ongoing or continuous in nature and the offense Guidelines is written to cover such behavior**. ..."Offenses covered by the following Guidelines **are** to be grouped under this subsection: ... **§ 2S1.1 [Money Laundering]** Id at p. 501, emphasis added.

As the "Introductory Commentary" explains, grouping is required in these circumstances for a specific reason:

> "In order to limit the significance of the formal charging decision and to prevent multiple punishment for substantially identical offense conduct,..."

The Commentary provides further specific guidance to the treatment of multiple counts: "Convictions on multiple counts do not result in a sentence enhancement unless they represent additional conduct that is not otherwise accounted for by the Guidelines. In essence, counts that are grouped together are treated as constituting a **single offense** for purposes of the Guidelines."[21]

In accordance with the required treatment of grouped counts as a "single offense," courts have treated sentencing on grouped counts as either mandating "a single sentence"[22] or

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[21] *Id.* at 498, "Part D - Multiple Counts," emphasis added.

[22] See *United States v. Chischilly*, 30 F.3d 1144, 1161 n.32 (9th Cir. 1994) (concurrent life terms for rape and felony murder reversed for sentencing judge's failure to group the charges of conviction under U.S.S.G. § 3D1.2.").

concurrent sentences.[23]

The error in this case occurred when the district court and the parties failed to adhere to the plain language of the Guidelines, and ignored the commentary and policy statements altogether, including that grouped counts are to be treated as a "single offense." Had the court looked to these provisions, it would have found a clear and unambiguous answer to the question it was uncertain how to resolve. When the Guideline range exceeds the statutory maximum, the statutory maximum prevails. Section 5G1.1 (Sentencing on a Single Count of Conviction) provides:

> "(a) Where the statutorily authorized maximum sentence is less than the minimum of the applicable guideline range, the statutorily authorized maximum sentence shall be the guideline sentence."

Given that the statutory maximum for money laundering was 20 years, under § 5G1.1, the court could not lawfully impose a sentence higher than 20 years. The court, however, never addressed § 5G1.1, nor did any of the attorneys bring it to the court's attention.

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[23] See *United States v. Moreno-Hernandez*, 48 F.3d 1112 (9th Cir. 1995) (concurrent sentences imposed on three counts in same group).

C. The Failure to Alert the Court to the Guideline Grouping Rules Was Ineffective Assistance of Counsel

The standard for judging whether a defendant was constitutionally deprived of the effective assistance of counsel is set forth in *Strickland v. Washington*.[24] In order to prevail on this claim, counsel's performance must be deficient and fall below an objective standard of reasonableness. The presumption that counsel's conduct falls within the wide range of reasonable professional assistance may be overcome by showing that counsel's action could not be "considered sound trial strategy."[25]

A defendant must also establish prejudice resulting from counsel's deficient performance. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[26] A court's determination of prejudice requires an

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[24] 466 U.S. 668, 104 S. Ct. 2052 (1984).

[25] *Strickland*, 466 U.S. at 687-688.

[26] *Id.*, 466 U.S. at 694.

assessment of the "totality of circumstances."[27]

In the instant case, it was objectively unreasonable for counsel to ignore the plain language of the Guidelines which state that money laundering counts must be grouped as a single offense.[28] The petitioners were severely prejudiced by counsel's failure to read and digest the Guidelines and/or to make appropriate objections to the court's determination of the ultimate sentence.

D. The 505 Year Sentence Violates Due Process

"The touchstone of due process is the protection of the individual against arbitrary action of government." *Daniels v. Williams*.[29] The 505 years sentences imposed on the petitioners in gross misapplication of the Guidelines is

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[27] *Id.*, 466 U.S. at 695; *see also Evans v. Lewis*, 855 F.2d 631, 636 (9th Cir. 1988).

[28] *See, Prichard v. Lockhart*, 990 F.2d 352, 354 (8th Cir. 1993) ("[I]t was objectively unreasonable for counsel to ignore the plain language of the statute and to fail to object when the trial Court inappropriately used Prichard's Texas marijuana conviction to enhance his sentence.")

[29] 474 U.S. 327, 331, 106 S. Ct. 621 (1986), *quoting, Dent v. West Virginia*, 129 U.S. 114, 123, 9 S. Ct. 231 (1889).

blatantly arbitrary. The policy statements tell district court judges that multi-count convictions may not result in life sentences that "neither just deserts nor crime control theories of punishment would justify." The commentary for closely related counts tell district courts to "limit the significance of the formal charging decision." But for the way the instant indictment was pleaded, petitioners could not have received more than 20 years.

The government cannot have it both ways. If petitioners' Guideline sentences are to be based on grouping all of the counts, and totaling the amount of money laundered from all the counts, then the counts must remain grouped together and a single sentence imposed not exceeding the statutory maximum. Any other interpretation would be totally arbitrary and would violate due process. This Court has long held that due process requires that criminal defendants be allowed to take advantage of the same rules that benefit prosecutors.[30]

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[30] *Wardius v. Oregon*, 412 U.S. 470, 472, 93 S. Ct. 2208 (1973) (Oregon notice of alibi rule which did not allow defendant reciprocal discovery of government's rebuttal witnesses violated due process); *Washington v. Texas*, 388 U.S. 14, 25, 87 S. Ct. 1920, 18 L. Ed.2d 1019 (1967) ("This is a case in which the State has recognized as relevant and competent the testimony of this type of witness, but has arbitrarily barred its use by defendant. This, I think, the Due Process Clause forbids.")

These issues are "debatable among jurists of reason" and a court "could resolve these issues [in a different manner]."[31] Further, given that no court has ever directly reviewed these issues, and given the consequences of an error -- 20 years vs. 505 years, effectively life without parole -- "the questions are 'adequate to deserve encouragement to proceed further.'"[32]

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[31] *Barefoot*, 463 U.S. at 893, n.4, 103 S. Ct. at 3394, n.4, *quoting, Gordon v. Willis*, 516 F. Supp. at 913.

[32] *Id.*

CONCLUSION

For the foregoing reasons, this Court should issue a writ of certiorari to the United States Court of Appeals for the Ninth Circuit to review the questions presented in this petition.

Respectfully submitted,

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APPENDICES

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 98-55767**
	)	
Plaintiff-Appellee,	)	DC #
	)	CV-97-2919-WDK
v.	)	CR-89-190-WDK
	)	
NAZARETH ANDONIAN,	)	Central California
	)	
Defendant-Appellant.	)	**ORDER**
	)	

Filed November 2, 1998

Before: THOMPSON and LEAVY, Circuit Judges

Appellant's petition for rehearing is construed as a motion for reconsideration and suggestion for rehearing en banc. So construed, it is denied. *See* 9th Cir. R. 27-10.

All pending motions are denied as moot.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 98-55768**
	)	
Plaintiff-Appellee,	)	DC #
	)	CV-97-2918-WDK
v.	)	CR-89-190-WDK
	)	
VAHE ANDONIAN,	)	Central California
	)	
Defendant-Appellant.	)	**ORDER**
	)	

Filed October 27, 1998

Before: THOMPSON and LEAVY, Circuit Judges

Appellant's petition for rehearing is construed as a motion for reconsideration and suggestion for rehearing en banc. So construed, it is denied. *See* 9th Cir. R. 27-10.

All pending motions are denied as moot.

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 98-55767**
	)	
Plaintiff-Appellee,	)	DC #
	)	CV-97-2919-WDK
v.	)	CR-89-190-WDK
	)	
NAZARETH ANDONIAN,	)	Central California
	)	
Defendant-Appellant.	)	**ORDER**
	)	

Filed July 7, 1998

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of appealability is denied. *See* 28 U.S.C. § 2253(c)(2).

APPENDIX D

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

UNITED STATES OF AMERICA,	)	**No. 98-55768**
	)	
Plaintiff-Appellee,	)	DC #
	)	CV-97-2918-WDK
v.	)	CR-89-190-WDK
	)	
VAHE ANDONIAN,	)	Central California
	)	
Defendant-Appellant.	)	**ORDER**
	)	

Filed July 7, 1998

Before: THOMPSON and LEAVY, Circuit Judges

The request for a certificate of appealability is denied. See 28 U.S.C. § 2253(c)(2).

APPENDIX E

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

NAZARETH ANDONIAN,	) Case No.
	) CV-97-2919-WDK
Petitioner,	)
	) ORDER RE:
v.	) CERTIFICATE OF
	) APPEALABILITY
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

Filed April 24, 1998

On February 19, 1998 Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is GRANTED. The specific issue(s) satisfy § 2253(c)(2) as follows:

_____

_____

_____

☒ The Certificate of Appealability is DENIED for the following reason(s):

☐ The detention complained of arises out of process issued by a State Court.

☐ The final order is in a proceeding under section 2255.

☒ There has been no substantial showing of the denial of a constitutional right.

☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

☐ The appeal seeks to test the validity of the detention pending removal proceedings.

DATED: April 24, 1998

William D. Keller
UNITED STATES DISTRICT JUDGE

APPENDIX F

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

VAHE ANDONIAN,	) Case No.
	) CV-97-2918-WDK
Petitioner,	)
	) ORDER RE:
v.	) CERTIFICATE OF
	) APPEALABILITY
UNITED STATES OF AMERICA,	)
	)
Respondent.	)
	)

Filed April 24, 1998

On February 19, 1998 Petitioner filed a Notice of Appeal and a request for a Certificate of Appealability pursuant to 28 U.S.C. § 2253. The Court has reviewed the matter.

IT IS HEREBY ORDERED:

☐ The Certificate of Appealability is GRANTED. The specific issue(s) satisfy § 2253(c)(2) as follows:

_____

_____

_____

☒ The Certificate of Appealability is DENIED for the following reason(s):

☐ The detention complained of arises out of process issued by a State Court.

☐ The final order is in a proceeding under section 2255.

☒ There has been no substantial showing of the denial of a constitutional right.

☐ The appeal seeks to test the validity of a warrant to remove to another district or place for commitment or trial.

☐ The appeal seeks to test the validity of the detention pending removal proceedings.

DATED: April 24, 1998

William D. Keller
UNITED STATES DISTRICT JUDGE

APPENDIX G

UNITED STATES DISTRICT COURT

FOR THE CENTRAL DISTRICT OF CALIFORNIA

UNITED STATES OF AMERICA, Plaintiff, v. NAZARETH ANDONIAN and, VAHE ANDONIAN, Defendants.	) Nos.) CV-97-2918-WDK) CV-97-2919-WDK) CR-89-190-WDK)) ORDER RE) MOTIONS BY) NAZARETH) ANDONIAN AND) VAHE) ANDONIAN TO VACATE, SET ASIDE OR CORRECT SENTENCE

Filed December 23, 1997

Inasmuch as the motions of Nazareth and Vahe Andonian are essentially identical; this Court consolidates them for purposes of its Order. The motions of the defendants are addressed seriatim.

1. Sufficiency of the evidence to prove a financial transaction.

The money laundering statute as embodied in Title 18 United States Code § 1956(a)(1) does indeed require proof of a "financial transaction." The transcontinental cash shipments that form the basis of each count are clearly "transactions" within the meaning of § 1956(c)(3) as they do constitute "a transfer, delivery or other disposition."

2. Instructional errors.

(a) The "financial transaction" instruction.

The defendants without raising the issue at trial or on appeal attack the Court's instruction regarding the term "financial transaction," as used in § 1956. Per *United States v. Frady*, 456 U.S. at 168, the moving party must demonstrate prejudice. Even were the instruction to be incorrect; there is no substantial likelihood that the instruction prejudiced the movant's defense. *See Frady* at p. 174.

(b) The "knowledge" instructions.

As counsel for the movants state, the law and the instructions surrounding the crime of money laundering was evolving at the time of this trial. Much time was spent by the judge and the attorneys fashioning instructions to address the issues raised by the defense. Upon review of the later-decided case of *United States v. Stein*, 37 F.3d 1407 (9th Cir., 1994), it is apparent that it is distinguishable from the facts and the instructions at issue. For the reasons identified by the government, this Court concludes there was no error in the "knowledge" and allied instructions.

(c) The "same form of unlawful activity" instruction.

This issue is raised for the first time during the appellate process and, as such, the defendants must demonstrate prejudice. None has been shown as it is clear the jury did not rely on this instruction. Instead, their answers to special interrogatories (see Exhibit G to the defendants' motion) unequivocally establishes that the movants "acted with the intent to promote the felonious buying, selling and dealing in narcotics and dangerous drugs."

Furthermore, were the Court to address the legal merit of the instruction; it is clear that it was a correct expression of the law. Defense counsel have misconstrued the legislative history, the law and the facts of the underlying case. These conclusions are clearly demonstrated by the government in their response at pages 18 through 21.

(d) The defendants need not know they were laundering narcotics proceeds instruction.

The government does not analyze whether this was a correct instruction. Instead, they argue there was no objection and, then turn to a there was no prejudice analysis.

Indeed, there was no prejudice. Even though the fact finders were instructed, ". . .it is not necessary to find that the defendant knew the property represented the proceeds of narcotics trafficking;" the fact is they specifically found that was just what was afoot. And, as noted by the government, the jury's failure to reach a verdict on the count one cocaine

conspiracy does not call into question this conclusion. Clearly, they observed what was so very apparent -- this vast amount of money, under the surrounding circumstances, related to the laundering narcotics proceeds. The fact that they didn't know the type of narcotics does not effect the analysis.

(3) Special interrogatories as a source of error.

The government's response effectively addresses the claims of error and is adopted by the Court.

(4) Alleged *Brady* violations.

(a) The plea to a misdemeanor tax violation by cooperating witness Mario Tankazyan.

Somehow counsel seems to believe that Tankazyan's plea to a misdemeanor tax violation is inconsistent with a contemporaneous argument by the government that the defendants proceeding to trial were engaged in felonious tax evasion. Counsel implicates *Brady*; such a position is nonsensical as trial and plea processes are discrete. Furthermore, such information in no way would have been exculpatory.

(b) Concealment of the allegedly defective currency seizure.

The government sets forth a litany of notice provided re the warrantless seizure at issue. Clearly, there was no suppression.

Given the aforementioned conclusion, there is no need to address the movant's lack of standing nor the claim of outrageous governmental conduct.

(5) The Court's refusal to immunize the witness John Tirakjean.

Counsel revisit an issue explicitly addressed at trial. For each of the reasons identified by the government, the ruling was and is correct.

(6) The sentences were improper.

The grouping analysis of the defendants is without merit. *See United States v. Palomba*, 31 F.3d 1456 (9th Cir. 1994).

Counsel also contends that the sentences were and are unconstitutional as they are cruel and unusual. This issue was addressed at the appellate level and found to have no merit.

A hearing is not necessary as the defendant's motions are not based on facts outside the record. *See United States v. Shak*, 878 F.2d 1156 at 1159 (9th Cir. 1989).

The defendants Ex Parte Application to File a Reply Memorandum is DENIED.

The motions of the defendants are DENIED.

IT IS SO ORDERED.

DATED: December 19, 1997

Judge William D. Keller